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3RD PARTY'S ESTABLISHMENT OF RELATIONSHIP WITH THE CHILD ACCORDING TO TURKISH CIVIL LAW

Abstract:

As a member of the family, the relationship of the child with the parents is considered in custody institution. But, how should the relationship be established with the other parent of the child if custody is given to one of the parents due to the termination of family relationship? If this condition is left to the initiative of the parents with the custody, especially in cases where an abrasive divorce process is experienced, it can lead to the use of children as a revenge tool. At this point, with the idea that it is to the benefit of the child to establish relationship with both parents even if separately, the legislator has made a legal regulation on this issue (TCL. Art. 323-324). According to the regulation mentioned, each of the parents has the right to request the establishment of appropriate personal relationship with the child who is not under his/her custody or is not given to him/her. But not only parents, third parties other than those, for example a grandparent may request to establish a personal relationship with the child in such a case. Turkish Civil Code allows a third person to establish a personal relationship with the child to the extent that it is to the benefit of the child (TCL. Art. 325). In our study issues of the conditions under which children can establish relationships with third parties, who can be accepted in this context and how to provide this relationship are considered.

Keywords:

Turkish Civil Law, Family Law, Custody

JEL Classification: K36

I. INTRODUCTION

The right to establish a personal relationship refers to the ability of the parent who does not hold the custody of the child or has the child to establish a relationship with the child. How to establish this relationship is regulated in the Turkish Civil Code. However, the Civil Code has recognized the right to establish relationship with the child not only to the parents but also to parties other than the parents.

Third parties' establishing a personal relationship with the child is considered through different conditions compared to building relationships with parents. Hence, the Civil Code has bound this possibility to the presence of extraordinary circumstances and best interest of the child. In our study, we have evaluated the issues such as under what circumstances it can take place, the limits and conditions of the relationship and who can be considered as a third party.

1. Legal Nature of the Right to Maintain Personal Relations

The right to maintain personal relations with the child is defined through the relationship with his parents. In regulating the personal relationship, attention must be paid in order to adequately satisfy the feeling of being parents¹. Although this relationship has been resolved by a legal order, it is based on paternity. Indeed, the right to personal relationships is accepted as one of the personal rights which is based on paternity and natural law². On the other hand, more recent opinions base this right not only on the paternity but also on the psychological feeling of being parents³. Even if the parent does not hold the custody of the child; s/he wants to talk to his or her child, communicate and stay in touch with him or her. It is observed that these justified and natural expectations have been legally protected and brought into a right. However, this is a right not only in terms of parents but also the child. Indeed, the UN Convention on the Rights of the Child has explicitly regulated the right of children to know his or her parent and maintain personal relations in Articles 7 and 9. In other words, the child has the right to demand to be able to maintain a relation with their parents just as the parents who have the right to demand to be able to establish a personal relationship with their children. This right is a part of the personality right not only of parents but also the child⁴.

The demands of third parties to maintain personal relations are based on moral and emotional basis. Especially in cases where the parent is unwilling or unable to establish this relationship, in a way, a personal relationship is attempted to be established instead of him or her. Thus, love, care and affection need of the child is tried to be met. Therefore, contrary to the right of children and parents, the right of third parties to establish a personal relationship with the child is not part of their personality⁵.

The issue of third parties' being able to establish relationship with the child has been the subject of debate in terms of grandparents in the Swiss-Turkish law. There was not

1 Tekinay, 286; Akyüz, 111; Baktır-Çetiner, 108.

2 Tekinay, 286; Akıntürk/Karaman, 315; Özlü, 160.

3 Akyüz, 110.

4 Berner Komm. Art. 273, Nr. 57; Basler Komm. Art. 273, Nr. 4; Serozan, 242; Serdar, 742; Erlüle, 219.

5 Serdar, 742.

a provision in the Civil Code neither in Switzerland nor in Turkey regarding the ability of third parties other than the parents to build a personal relationship with the child. In Switzerland, this case was not considered a loophole in the law but it was agreed that the legislator did not regulate such a relationship deliberately⁶. In Turkey, the issue has been the subject of the Unification of Judgments dated 18.11.1959, 12/29⁷, and Turkish Court of Cassation accepted the demands of grandparents to build a personal relationship with their grandchildren on the grounds that there was a loophole in the law on this subject and such a relationship was to the child's interest. Despite these two approaches, the matter on third parties' establishing a personal relationship with the child was regulated both in Switzerland and in Turkey with the amendment made in the Civil Code later⁸.

2. Conditions

a) In Terms of the Child

In order to be able to demand to establish a personal relationship, the custody of the child must have been entrusted to a parent, and the child should not be taken from him or her. Giving custody to one of the parents appears in case of divorce and separation. In the divorce case, the judge gives the child's custody to one parent. The interest of the child is essential in this decision (CC. Art.182, 336). And in the case of a divorce judgment, the judge decides which parent will have the custody of the child (CC. Art.182, 197).

Removal of custody is also possible by court decision if the parent does not fulfil the requirements of the custody (CC. Art. 348). The custody can be removed from both parents as well as one parent. If custody is removed from both parents, a guardian is appointed to the child.

Although the custody is not removed, taking the child from the parents is in question when the child is placed in another family or organization. The situation still relates to the use of custody badly (CC. Art. 347).

In the event that the child is in one of these states, it is possible that the mother, father or third parties who do not have the right to custody can establish a personal relationship with the child.

b) Terms Required by the Civil Code

aa) Existence of Extraordinary Circumstances

The ability of third parties to establish a relationship with the child depends on the existence of extraordinary circumstances. Although what extraordinary circumstances

6 Oğuzman/Barlas, 99, Nr. 330; Ataay, 376; Tekinay, 523; Feyzioğlu, 386; Saymen/Elbir, 273; Akıntürk/Karaman, 315.

7 The decision was published in the Official Gazette No. 10482 dated 16/04/1960.

8 In Switzerland, positive changes were made in the Federal Law dated 06.25.1976 which entered into force on 01.01.1978 by adding ZGB Art. 274. Akıntürk/Karaman, 316; Kılıçoğlu, 605; Oğuzman/Barlas,. In Turkey, the issue was regulated in the Turkish Civil Code N.4721 Art. 325. which was accepted on 22.11.2001, published in the Official Gazette No. 24607 on 08.12.2001 and entered into force on 01.01.2002.

can be is not specified in the law, it is accepted that the absence of the possibility of establishing relations with the child is the basic idea here⁹. If a relationship bond with the child is established but not sustained or a relationship has not been able to be established but is wanted to be established, it is sufficient to make a request. Otherwise, extraordinary circumstances have not been required such as a mother or father to be dead or not using the right to establish their personal relationships¹⁰. Thinking otherwise, in our opinion means that the application of CC. Art. 325 is extremely limited¹¹.

Limitation of the CC for extraordinary circumstances narrows third parties' demands to establish a relationship with the child. The court only gives a positive answer to the demand in the presence of such cases. General tendency is that circumstances where contact with the child has been broken and there is no opportunity to see, caress, take care of and spend time with the child should be considered extraordinary¹². If the child has moved to a distant city or abroad, the demand of grandparents, the brothers and/or sisters living in different places, the foster family who have raised the child and even the biological father with whom paternity has not been set up can be considered in this way¹³.

Even if parents maintain personal relations with the child, it does not prevent third parties from making such a demand¹⁴. However, it is not possible for third parties to establish personal relations without the consent of the parent with custody until the decision of the court (CC Art. 326/ III).

bb) Child's Best Interest

According to CC. Art. 325, establishing relationship with third parties is bound to the child's best interests. This requirement which is not being sought between the child and parents seem to be required for third parties by law. This situation is natural when one considers the bond between the child and his or her mother and father since the right of a parent to custody of the child and the right of a child to establish a relationship with his or her parent/s requires this. However, third parties are not considered in this way. Being able to establish a relationship with the child is bound to requiring the best interest of the child because they do not have any rights over the child¹⁵.

Under general custody provisions, the regulation of "in determination of personal relations, the best interest of the child is considered in terms of health, education and moral welfare" (CC. Art. 182/II) is located. There is no doubt that this provision taken as a basis in the regulation of the personal relationship with parents will be taken into consideration when determining the best interest of the child. Thus in regulation of

9 Berner Komm. Art. 274a, Nr. 19; Basler Komm. Art. 274a, Nr. 5; Dural/Öğüz/Gümüş, 144; Kılıçoğlu, 608; Serdar, 755.

10 Serdar, 756; Erlüle, 243. the opposite view, Kılıçoğlu, 608; Kılıçoğlu, 158. There was not such a regulation in the CC No. 743 and it was argued that the grandparent may request for such a relationship only in case of death or disappearance of the mother or the father. Ataay 371; Tekinay 525.

11 Yargıtay (Court of Cassation) 2. HD. E. 2014/16903, N. 2014/24334, D. 01.12.2014 (www.hukukturk.com); Yargıtay 2. HD. E. 2015/23075, N. 2015/23757, D. 09.12.2015 (www.kazanci.com).

12 Serdar, 755.

13 Öztan, 606; Serdar, 755.

14 Serdar, 756.

15 Berner Komm. Art. 274a, Nr. 15; Basler Komm. Art. 274a, Nr. 2.

establishing personal relationships with third parties "to the extent consistent with the child's best interest", CC Art. 325 want to express that these issues should be considered. Likewise, the Council of Europe Children with Personal Relations Board to the European Convention¹⁶ Art.5. regulates that depending on the child's best interests, the child can establish relationships with someone other than his parents.

The issue that the child's interest is a priority value in matters relating to children is regulated in Article 3 of the UN Children's Rights Convention. According to this "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Although CC does not contain a general provision in this respect, in accordance with article 90 of the Constitution that regulates that international agreements duly put into effect have the force of law, the UN Children's Rights Convention has become a domestic law. Hence the convention was signed and ratified by the Parliament in accordance with the procedure¹⁷.

In article 9 of the UN Children's Rights Convention that regulates the right to maintain personal relations refers to not being contrary in the child's best interests. When the two provisions of the Convention are considered together, it is concluded that the child's best interest must be kept in mind not only in maintaining personal relations, but also in all issues related to the child¹⁸.

3. Third Parties that are Able to Maintain Personal Relations

CC art. 325 regulates third parties' being able to maintain personal relations with the child. This matter has reached a legal regulation after a controversial process in the Swiss-Turkish Law. Former CC. stated that in case of divorce, establishing a personal relationship of a parent to whom the child is not given with the child will be issued by the judge but whether other relatives, especially grandparents have the right to establish such a relationship or not was not regulated. Swiss Federal Court ruled that absence of a regulation on this issue would not constitute a loophole in the law and grandparents cannot demand establishment of a personal relationship with the child because the legislator does not aim to establish such a relationship¹⁹.

Turkish Court of Cassation has come to a different conclusion on the same issue. In the Unification of Judgments dated 18.11.1959, Turkish Court of Cassation (Yargıtay) ruled that there was a loophole in the law the loophole mentioned must be filled considering the social structure, characteristics and customs of the Turkish community and grandparents are able to maintain personal relations with the child²⁰.

16 This contract was signed on 15.07.2003 and approved by law No. 6066 dated 09/11/2010 by Turkey. With the decision of the Council of Ministers dated 14.10.2011, it entered into force through the publication of the Official Gazette dated 17.11.2011 and numbered 28115.

17 Turkey signed the UN Convention on the Rights of the Child on 14.09.1990 and it was ratified by law No. 4058 on 12.9.1994. With the decision of the Council of Ministers on 12.23.1994, it was published in the Official Gazette No. 22 184 and entered into force on 27.01.1995. For extensive information about the history and text of the contract agreement, see Ballar, 27, vd.

18 Serdar, 748.

19 BGE 54 II 4 (www.servat.unibe.ch/dfr/pdf/c2054004.pdf)

20 Oğuzman/Barlas, 100, Nr. 330.

Today, both in Switzerland and Turkey, this issue has been resolved with the provision established that makes it possible to maintain such a relation²¹.

In the event that was subject to the decision of Turkish Court of Cassation, legal regulations are more comprehensive although grandparents are the ones in demand. According to Art.325 of CC, "the right to request the establishment of a personal relationship with the child" may also be granted to other people especially to the relatives. So, the grandparents being in the first place, the uncle, the aunt and other relatives may request to establish a personal relationship with the child²². But the legislation does not restrict the people who are able to make this request to relatives²³. So, the persons who want to establish a personal relationship with the child may be foster parents, step parents²⁴ or other people (CC. Art. 347) who have established a bond with the child as well as relatives²⁵.

4. Establishment of Personal Relationship

Establishing a personal relationship requires, first and foremost, a demand²⁶. The third party, who wants to establish a personal relationship with the child, must make a request to court. Here, it is important to have established the bond. Of course, it is not possible for a person without any bond with the child to establish a personal relationship. The legislator does not restrict the possibility of the personal relationship to the relatives but the main reason underlying the presence of extraordinary circumstances and the aim to keep the best interests of the child in mind is that a circumstance which may harm the child can be eliminated. In this context, the judge is the authority to evaluate the request. As the judge makes an evaluation, he primarily decides whether or not there is a bond between the child and the requesting party and whether such a relationship is in the best interest of the child or not. But this is not enough; the law also requires the presence of an extraordinary circumstance. In the doctrine, circumstances where contact with the child has been broken and there is no opportunity to see, caress, take care of and spend time with the child are considered extraordinary²⁷. Until the decision of court, the relationships that can be established with the child is subject to the consent of the parent with the custody (CC. Art. 326/III).

The court for the request is the court where the child inhabits. (CC.Art.326/I). In the request for personal relationship of parents, the courts for divorce and the protection of the marital union are also authorized (CC. Art. 326/II). However, for third parties, these

21 Oğuzman/Barlas, 100, Nr. 331.

22 Berner Komm. Art. 274a, Nr. 11, 12; Basler Komm. Art. 274a, Nr. 4.

23 According to the European Convention for the Establishment of Children's Personal Relationship Art. 5, the people with family ties with the child other than parents can also establish personal relationship with the child. Family ties have been defined as "a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship" (Art. 2). The contract sets States Parties free to extend this provision to persons other than those mentioned (Art. 5).

24 Berner Komm. Art. 274a, Nr. 14; Basler Komm. Art. 274a, Nr. 3. Yargıtay 2.HD. E. 1991/4151, K. 1991/7800, T. 13.05.1991; Yargıtay 2.HD. E. 2012/2698, K. 2012/22458, T. 25.09.2012 (www.hukukturk.com).

25 Öztan, 473; Dural/Öğüz/Gümüş, 141; Hatemi/ Kalkan Oğuztürk, 130, Nr. 99; Kılıçoğlu, 607; Kılıçoğlu, Yenilikler, 158; Serdar, 755; Erlüle, 243.

26 Dural/Öğüz/Gümüş, 141. Yargıtay 2. HD. E. 2015/5600, K. 2015/20436, T. 04.11.2015 (www.kazanci.com).

27 Serdar, 755. The Court of Cassation has accepted the demand of personal relationships by grandparents living in the Netherlands. Yargıtay 2. HD. E. 2015/12060, K. 2015/14471, T. 02.07.2015 (www.kazanci.com).

courts may be authorized only if personal relationships have been requested in addition to requests of divorce and the protection of the marital union.

5. The Frame of Personal Relations

The personal relationship between the child and third parties are established and issued by the judge in accordance with the interest of the child. The judge has wide discretion in this regard. The judge considers the age, education, health of the child and the place where he or she lives and in the same way, the relationship of the requesting party with the child, where he or she lives and his or her profession²⁸. Listening to the child is also required during this evaluation. Because the UN Convention on the Rights of the Child has regulated the right of the child to express opinion and give approval on matters related to him or her. If the child is old and mature enough to exercise these rights, the judge must listen to him or her while giving a decision²⁹. Similarly, in the Council of Europe Convention on Personal Relations Concerning Children, the child's right to receive all relevant information, be consulted, and express his or her views has been regulated separately and clearly (Art. 6).

The judge determines the form of the personal relationship. When the purpose of the parties that make the request is considered, that fact is that, it is to see the child. The Council of Europe Convention on Personal Relations Concerning Children has regulated the personal relationship as child staying for a limited period of time with or meeting a person (Art.2). Seeing the child is regulated in the form of a visit. Though, if the child is small, personal relationship will necessarily be in the form of a visit³⁰.

If the judge has already established such a relationship, he must also regulate how to use the right to visit. First of all, the location and time of the visit must be determined. The place must be convenient for the meeting³¹ and the time must be long enough to satisfy the feelings³². Frequency and duration of the visit must be determined; unclear expressions that may lead to argument must be avoided³³. This relationship must not take place under the supervision of a parent who has the custody or another person, and the child and the third party must be given the opportunity of a private and independent relationship. However, if there is the possibility child's getting harm, it is also possible to establish a personal relationship under supervision by the court if the child's best interest requires³⁴. The Council of Europe Convention on Personal Relations Concerning Children has regulated this issue (Art. 4).

It is a fact that, although the relationship established in the form of a visit is anticipated to carry the qualifications listed above, it may be exposed to a number of limitations arising from causes such as the place of living, work, health and education of the child and/or the requesting person. For example, if the child or the requesting person lives

28 Öztan, 470; Feyzioğlu, 384; Tekinay, 286; Köprülü/Kaneti, 199; Saymen/Elbir, 273; Serdar, 764; Erlüle, 223.

29 Serozan, 69, Nr. 3.

30 Öztan, 469; Serdar, 761; Erlüle, 227.

31 Yargıtay 2. HD. E. 2015/5738, K. 2015/5665, T. 26.03.2015 (www.kazanci.com).

32 Feyzioğlu, 389; Köprülü/Kaneti, 199; Serdar, 762.

33 Serdar, 763; Erlüle, 233.

34 Basler Komm. Art. 273, Nr. 25; Dural/Öğüz/Gümüş, 143, Nr. 758.

abroad, the frequency of visits will be less, and meetings will be limited to the holiday period.

The form of establishing personal relationship is not limited to a visit. Relationship can also be established through communication (correspondence, telephone, videophone communication or e-mail). This form of relationship can be adopted if the child is old enough, can use these means of communication and particularly if they live in distant cities. The relationship may be established, for the same reason, as in the form of both communication and visits. The judge has the discretion on these issues. The judge will decide according to the best interest of the child.

6. Limits of Personal Relationship

First of all, it should be noted that, before the establishment of a personal relationship with a third party by a court decision and such a relationship is possible only with the consent of parents who have the custody. At the stage where there is no court decision, personal relationship cannot be established with the child without the consent of the parent (CC. art. 326/ III).

If the request by third parties is justified and a personal relationship is established by the court, it also determines the boundaries of the relationship in the decision. The court will reject a request which is not in the best interest of the child, for example a request which will adversely affect the morality, emotional and spiritual development or the education of the child, from the beginning; and it will prevent the establishment of a personal relationship. Therefore, such limitations are related to the request of establishment of personal relationship considered as possible.

The person who has the opportunity to establish a personal relationship must use good faith. If the relationship established before starts to be harmful for the child or violate the best interest of the child, the court can change the shape of the relationship and even completely remove it upon the request of the parent with custody.

The Civil Code has regulated that this right can be removed in case of the abuse of this right by the parent who can maintain a personal relationship with the child, especially the endangerment of the child's peace, violation of the parent's obligation, not taking care of the child seriously or the presence of other reasons (CC. art. 324/II, art. 182/II). There is not such a regulation for third parties' establishment of personal relationships but the restriction imposed for parents will inevitably be applied to the third parties as determined in CC. Art.325/II. According to this, the third person who has the right to have contact with the child is obliged to avoid from actions which may prevent child's upbringing and education and harm the relationship with his/ her parents³⁵. Then, if necessary for the child's best interests, the relationship established before may be restricted or removed later.

The relationship can be rearranged or completely removed if it gives harm to the psychology of the child, the time or form of the anticipated meeting is not complied with, there is a possibility of violence or abuse or the health of the child is in danger. It is

³⁵ Kılıçoğlu, Yenilikler, 159.

accepted that the judge either will make this decision *ex officio* or upon request in such a situation³⁶. The rearrangement can also be provided in the form of relationship coordinated under the supervision (the European Convention on Contact concerning Children, Art. 3). But it is unlikely that the judge will be aware of this situation without a request. The parents with custody or the guardian may request the personal relationship established to be removed on the grounds that it is not to the interest of the child from the court.

We have mentioned that the opinion of the child must be taken in establishment of the personal relationship (UN Convention on the Rights of the Child, Art. 9; the European Convention on Contact concerning Children, Art. 6). If the child does not want to carry on visit or rejects to meet after the relationship is established, the result must be the same. This situation strengthens the opinion that this relationship is not the interest of the child. The judge either changes the form of personal relationship or removes it completely. But here, the judge must investigate the reason why the child refuses to visit. Because this may be due to the guidance of the child's parent to sabotage the visit. So, for the judge, listening to the child and making an evaluation with the help of experts will be to the point. If a child refuses to visit under the influence of the parent, the situation must be resolved, again with the help of experts, in the interest of the child.

II. CONCLUSION

The right to maintain personal relations with the child is primarily left to the parent who does not have the custody of the child. However, the evaluation of how third parties' request to establish a personal relationship with the child other than the parents had not been regulated in the Swiss-Turkish Civil Code. Even this issue led to different evaluations by the high courts of the two countries. Later, the matter on third parties' being able to maintain a personal relation with the child was regulated in the Civil Code both in Switzerland and in Turkey.

When the principle of the child's best interest, which especially became prominent with the adoption of the UN Convention on Rights of the Child, taken into consideration; such a development can be assumed as positive. For the child, maintaining personal relations with people with whom he or she can establish an emotional bond other than his or her parents may contribute to his or her mental and emotional development. The European Convention on Contact concerning Children also acknowledges persons other than his or her parents could request to establish this kind of contact with the child (Art. 5).

The Civil Code has bound the possibility of third parties' establishment of personal relationship to the presence of extraordinary circumstances and the child's best interest. For this case, which is regulated as a mutual right between the parents and the child, it is natural that it is bound to the presence of certain circumstances in terms of third parties. What is meant by exceptional circumstances is the situations in which the communication cannot be achieved with the child and seeing him or her or receiving news from him or her is no longer possible. Since child's best interest is a criterion to

³⁶ Öztan, 473; Serdar, 777.

be taken into account in all activities and transactions related to the child, when giving a decision, the court must keep this issue in mind even when not mentioned.

The people that can establish relationship with the child are primarily the relatives but the law has not limited it with relatives. If it contributes to mental and emotional development of the child, this approach requires that the request of person who has been able to establish an emotional bond with the child even if he or she is not a relative must be evaluated positively.

The judge determines the content, form and duration of the personal relationship. He or she shapes the relationship in the child's best interest. However, if the situation starts to change after the relationship is established against the best interest of the child, the child is hurt or in danger of being hurt, it is possible that the relationship can be reorganized or even removed with the decision of the court.

As this regulation allows third parties to establish a personal relationship with the child as long as it is in the best interests of the child, it accepts that such a relationship will provide benefit for the child and develop him or her emotionally, spiritually and morally. When the opinion, adopted nowadays, in which the best interest of the child takes priority, is taken into consideration, it is clear that the provision exhibits an appropriate approach.

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